

THE "HOLEY" BONDS OF MATRIMONY: A CONSTITUTIONAL CHALLENGE TO BURDENSOME DIVORCE LAWS

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INTRODUCTION

Divorce laws in our country have changed greatly over the past fifty years. Marriage and the family in general have transformed from primarily social institutions into more private, individual-oriented structures.¹ Some people call these evolutions a "crisis."² It is my contention that changes in our social institutions must be reflected in the laws that govern them, and while divorce laws have changed, they have yet to change enough.

In Section I, I discuss the Fourteenth Amendment Due Process Clause and the protection it provides to certain individual liberties from unwarranted state intrusion.³ Included in those protected liberties is the right to make personal and intimate decisions related to fundamental rights such as marriage.⁴

In Section II, I argue, based on the relevant Fourteenth Amendment doctrine, the trends in our society surrounding domestic relations, and the very personal nature of the decision to marry itself, that along with the fundamental right to marry comes a fundamental right to divorce which is protected under the Due Process Clause.

I discuss the fault-based divorce laws still in existence, as well as many of their "no-fault" counterparts in Section III. I argue that many of these laws infringe on the fundamental right to divorce.

In Section IV, I address two possible state interests in these laws: preserving the stability of traditional marriages and protecting tradi-

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¹ See Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 464–84 (1983) (discussing the progression in many courts to an individual rights-based analysis of marriage and family).

² *Id.* at 471.

³ See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (establishing the concept of liberty under the Fourteenth Amendment Due Process Clause to protect rights of the individual, including marriage and rearing children, from unwarranted state intrusion).

⁴ See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (affirming that there is a fundamental right to marry).

tional families in order to ensure the well-being of children. While these interests might be legitimate,⁵ I maintain that the divorce laws supposedly promoting these interests impermissibly infringe on the fundamental right to divorce because they are not closely tailored to those interests and therefore fail to satisfy the heightened scrutiny that is applied when a fundamental right is involved.

The essence of my argument is that the decision to end a marriage is of such a private and intimate nature that any regulation infringing on that choice which does not actually further a sufficiently important interest of the state cannot be upheld under the concept of liberty embodied in the Fourteenth Amendment.

I. THE FOURTEENTH AMENDMENT AND THE RIGHT TO PRIVACY

The Constitution does not explicitly provide a right to privacy.⁶ Nowhere in its express language is such a right mentioned. However, the Supreme Court has long recognized that the Constitution does implicitly guarantee a right to privacy in certain circumstances⁷ and under various amendments.⁸ This implied right has frequently been articulated as stemming from the notion of liberty that is guaranteed by the first section of the Fourteenth Amendment, also known as the Due Process Clause.⁹

The cases that recognize a right to privacy under the Fourteenth Amendment have been characterized as protecting two types of interests.¹⁰ The first is the individual's interest in his or her choice not

⁵ To a certain degree, the legitimacy of protecting traditional marriages and families is questionable, as I discuss in greater detail in Section IV.

⁶ See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (explaining that there is no explicit right to privacy provided in the Constitution).

⁷ See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (denying a court the power to order a physical examination before trial in an action for personal injuries and declaring that, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person").

⁸ See *Roe*, 410 U.S. at 153 (holding the right to privacy implicit in the Fourteenth Amendment to include the right to have an abortion); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (striking down an obscenity statute making private possession of obscene materials illegal because the statute infringed on rights of privacy grounded in the First and Fourteenth Amendments); *Terry v. Ohio*, 392 U.S. 1, 89 (1968) (implying protection of privacy grounded in the Fourth Amendment); *Katz v. United States*, 389 U.S. 347, 350 (1967) (describing rights of privacy under various amendments); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (holding that a law forbidding the use of contraceptives unconstitutionally infringes on the right to marital privacy as implied in the penumbrae of rights guaranteed by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments).

⁹ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (establishing the concept of liberty under the Fourteenth Amendment to encompass many rights of the individual, including marriage and rearing children).

¹⁰ See *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (describing different interests involved in the right to privacy).

to disclose private matters.¹¹ The second, which will be the focus of this Comment, is the individual's interest in making certain important decisions independently, free from unwarranted state intrusion.¹² The cases invoking this second interest explain that only those decisions relating to freedoms and rights that are found to be "fundamental," or "implicit in the concept of ordered liberty,"¹³ are to be included in this constitutional guarantee.¹⁴ If a right is found to be fundamental, then it is protected "by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."¹⁵ Rights which the Court has found to be "fundamental," and therefore protected by the Fourteenth Amendment's right to privacy, include choices regarding procreation,¹⁶ contraception,¹⁷ child rearing, education,¹⁸ and, of most importance to the current discussion, decisions relating to marriage.¹⁹

A fundamental right to marry has been alluded to in Supreme Court case law as far back as 1888, when the Court described marriage "as creating the most important relation in life."²⁰ In 1942, it was again touched upon when the Court addressed the constitutionality of a law allowing the sterilization of habitual criminals and declared that, "[m]arriage and procreation are fundamental to the very existence and survival of the race."²¹

It was about twenty years later when the Court discussed the right to marry in terms of a constitutionally protected right to privacy. In

¹¹ *Id.* at 599.

¹² *Id.* at 599–600.

¹³ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

¹⁴ See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (explaining that the right to privacy includes only such "fundamental" rights).

¹⁵ *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

¹⁶ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (affirming the right to have an abortion as part of the right to privacy implicit in the Fourteenth Amendment); *Roe*, 410 U.S. at 153 (establishing the right to abortion to be included in the Fourteenth Amendment's right to privacy); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (declaring the fundamental nature of marriage and procreation).

¹⁷ See *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972) (discussing the right to privacy and its inclusion of the rights of individuals to use contraceptives); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (holding that the right to privacy includes marital privacy and the right to use contraceptives).

¹⁸ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) (striking down a law requiring children to attend public school because it infringed on parents' rights to educate their children as they please).

¹⁹ See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (striking down a law that prohibited marriage of individuals not up-to-date in child support payments because it infringed on the fundamental right to marry); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down a law banning interracial marriage because it violated the Fourteenth Amendment Due Process Clause by infringing on the fundamental right to marry).

²⁰ *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

²¹ *Skinner*, 316 U.S. at 541.

the 1965 decision of *Griswold v. Connecticut*,²² the Court explicitly referred to "the notions of privacy surrounding the marriage relationship,"²³ and described the relationship of husband and wife as "lying within the zone of privacy created by several fundamental constitutional guarantees."²⁴

In the monumental case of *Loving v. Virginia*, in which a state statute forbidding interracial marriage was struck down, the Court rooted the right to marry in the Fourteenth Amendment.²⁵ The Court found that the challenged statute "deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment."²⁶ The Court stated further that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."²⁷ This concept was most recently affirmed and reinforced in the Supreme Court decision of *Zablocki v. Redhail*.²⁸ In *Zablocki*, the Court declared that "past [Supreme Court] decisions make clear that the right to marry is of fundamental importance,"²⁹ and "recent decisions have established that the right . . . is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."³⁰

The case law demonstrates that the choice to enter a marriage and the decisions relating to marriage are of fundamental importance, and are included in and protected by the implicit constitutional guarantee of privacy under the Due Process Clause of the Fourteenth Amendment.³¹

II. A FUNDAMENTAL RIGHT TO DIVORCE

Under the current doctrine, there are many arguments for finding that the right to privacy rooted in the Fourteenth Amendment

²² 381 U.S. 479, 485–86 (1965) (holding that the right to privacy includes marital privacy and the right to use contraceptives).

²³ *Id.* at 486.

²⁴ *Id.* at 485.

²⁵ 388 U.S. 1, 7 (1967). The case was decided on a combination of equal protection and substantive due process grounds. However, it explicitly refers to the concept of liberty embedded in the Due Process Clause, and it has been interpreted as articulating a fundamental right to marriage. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 957 (Mass. 2003) (interpreting *Loving* to declare a fundamental right to marriage); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (interpreting *Loving* to hold that the law in question deprived the couple of "a fundamental liberty protected by the Due Process Clause, the freedom to marry").

²⁶ *Loving*, 388 U.S. at 12.

²⁷ *Id.*

²⁸ 434 U.S. at 383 (affirming that there is a fundamental right to marry).

²⁹ *Id.*

³⁰ *Id.* at 384.

³¹ *Id.*

Due Process Clause encompasses the right to obtain a divorce. It is arguable that the well-established fundamental right to marry simply includes the right to divorce. While the cases may refer explicitly to a "right to marry,"³² none imply that once the right to marry is exercised, the constitutional treatment of the marital relationship changes. The language used in the right to marry doctrine is often broad. For example, the right is described as encompassing the freedom to make "decisions 'relating to marriage.'"³³ Therefore, it is arguably not just the right to enter a marriage that is constitutionally protected but also the personal relationship itself, which would implicitly include the right to end it.

In *Griswold*, the Court held that the right of marital privacy prohibits the state from intruding on a husband and wife's right to use contraception.³⁴ *Griswold* had nothing to do with entering a marriage, but the Court applied the Fourteenth Amendment (among others) to protect the personal decisions made within the marriage. Such "personal decisions" should logically include the decision to leave the very relationship that triggers protection in the first place. This is essentially an argument of pure logic. If the Fourteenth Amendment protects an individual's choice to enter the personal and important relationship of marriage, and it protects the privacy of the individual to make decisions with respect to the relationship, then it logically follows that the personal and individual choice to leave such a relationship must be protected as well. When applied to other fundamental rights, this logic is obvious. The right to use contraception³⁵ does not mean that once you use contraception you must continue to do so. The right to send your child to private school³⁶ does not mean that once you put him there he must remain there. So why would the right to marry be any different?³⁷ To find that the fundamental right to marry does not include a right to divorce is the equivalent of finding that your right to enter a marriage is protected, and your right to make marital decisions is protected, unless, of course, that decision is not to be married anymore, in which case the protection of the Four-

³² *Id.* at 383.

³³ *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).

³⁴ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

³⁵ *Id.* (acknowledging a right to use contraception).

³⁶ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (describing the right of parents to choose how to educate their children).

³⁷ It might be argued that marriage is different because traditionally a marriage is supposed to last forever, and therefore the ending of a marital relationship should be considered very differently than the beginning of one. See Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 276-77 (1997) (listing common assumptions made in the legal system regarding marriage and the traditional family unit). However, the current status of the "traditional" family is questionable. I discuss this in greater detail in Section IV.

teenth Amendment has expired and you are (figuratively but, alas, not literally) on your own.

Of course, while this logical argument may be appealing, the jurisprudence surrounding both marriage and fundamental rights is not that simple. There is a strong tradition of public policy favoring the family unit³⁸ and generally marriage has been considered a social relationship that is subject to the police power of the states.³⁹ This state power, however, is not unlimited.⁴⁰ It is subject to, and has been restrained by, the Fourteenth Amendment.⁴¹ Of course, on the other hand, such due process protection is not unlimited either. The doctrine makes clear that in order to receive the full protection of the Fourteenth Amendment, as has been afforded in cases surrounding marriage, there must be a clear and distinct fundamental liberty interest at stake.⁴² Therefore, the existence of a fundamental right to marry will not likely be enough under the current doctrine to find that the right to divorce, arguably a different right altogether, is logically established.⁴³ This means that it will probably be necessary to show that the right to divorce is fundamental in and of itself.

The Court has often found that for a right to receive the utmost protection from unwarranted state intrusion under the Fourteenth Amendment Due Process Clause, it must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁴⁴ It is questionable whether divorce by itself, when not simply categorized as a personal marital decision, would be given such a ranking. Prior to the 1960s, divorce was closely regulated and was only available when one spouse could be proven at fault,⁴⁵ and grounds for fault were limited to an exclusive statutory list.⁴⁶ Before the mid-nineteenth century, divorces were granted only through special legis-

³⁸ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (discussing the tradition of protecting the marital family).

³⁹ See *Loving v. Virginia*, 388 U.S. 1, 7 (1967) ("While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so [in light of this Court's precedents]" (citations omitted)).

⁴⁰ *Id.*

⁴¹ See *id.* at 12 (striking down a marriage regulation on Fourteenth Amendment grounds).

⁴² See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (describing the necessity of a fundamental right in order to apply heightened scrutiny under the Fourteenth Amendment).

⁴³ See, e.g., *Michael H.*, 491 U.S. at 126-27 (taking a very narrow view regarding the establishment of a fundamental right).

⁴⁴ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

⁴⁵ Only one spouse could be found at fault; the other had to be innocent. See *infra* note 101.

⁴⁶ See Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 609 (1997) (discussing possible challenges to the proposed return to fault-based divorce laws).

lative actions.⁴⁷ It was in the early twentieth century that the majority of the states enacted legislation permitting courts to grant divorces.⁴⁸ It was not until the early 1960s that the fault system was abandoned due to changes in attitudes regarding marriage, divorce, and the state's role in each.⁴⁹ This was part of the transition of the concept of family from a public institution to a much more private one.⁵⁰

This brief historical overview demonstrates that while divorce was always present in our ever-changing society, and while it has slowly evolved into a more acceptable practice,⁵¹ its history does not necessarily support the establishment of a fundamental right. However, the fact that the right to divorce might not be categorized as fundamental based on an argument of tradition in our society is not the end of the inquiry. While rights have often been found to be fundamental because of their historical and traditional significance,⁵² more recent doctrine illustrates a divergence from that approach. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."⁵³ The trend in recent decisions has been to also consider the social changes our society has undergone and to take such changes into consideration when determining the amount of protection that is necessary under the Fourteenth Amendment to ensure that Due Process is properly protected.⁵⁴

In *Roe v. Wade*, where a woman's right to have an abortion was held to be fundamental under the Fourteenth Amendment, the Court referred to "the influences of recent attitudinal change" and the presence of "new thinking about an old issue."⁵⁵ This implies that history alone will not always determine whether a right is fundamental when an activity has more recently come to be accepted as an important right in our society.

⁴⁷ See Adriaen M. Morse, Jr., *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 607-12 (1996) (describing the history of fault-based divorce).

⁴⁸ Bradford, *supra* note 46, at 610 (noting that all states except South Carolina passed laws to allow courts to dissolve marriages).

⁴⁹ *Id.* at 611 (describing "distaste for public intrusion" as driving the movement away from the fault system).

⁵⁰ See Amy L. Stewart, *Covenant Marriage: Legislating Family Values*, 32 IND. L. REV. 509, 510 (1999) (describing the social evolution of marriage and family).

⁵¹ See Arland Thornton, *Changing Attitudes Toward Separation and Divorce: Causes and Consequences*, 90 AM. J. SOCIOLOGY 856, 861 (1985) (describing the increase in acceptance of divorce).

⁵² See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (discussing how the history of a right is involved when establishing that right as fundamental).

⁵³ *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)) (alteration in original).

⁵⁴ See *id.* at 577-78 (discussing the emerging awareness of privacy rights); *Roe v. Wade*, 410 U.S. 113, 143-47 (1973) (discussing the changing attitudes toward abortion during the early 1970s).

⁵⁵ *Roe*, 410 U.S. at 116.

In *Lawrence v. Texas*, the Court held that a criminal statute prohibiting homosexual sodomy violated the Due Process Clause of the Fourteenth Amendment.⁵⁶ The Court addressed the many arguments made regarding the historical prohibition of such conduct, and while it found that much of the historical information was faulty at best,⁵⁷ it also went on to explain that “our laws and traditions in the past half century are of most relevance.”⁵⁸ Upon considering recent social and legal development, the Court found “an *emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁵⁹ The right, therefore, was not based on historical patterns but instead on a much more recent “emerging awareness” in our nation of a fundamental liberty interest.

This line of reasoning, when applied to divorce, would support a finding that there should exist a fundamental right to dissolve one’s marriage. Studies surrounding the attitudinal change toward divorce show that social acceptance of divorce has increased greatly over the past half century.⁶⁰ The legal changes are evident in the adoption of no-fault divorce laws⁶¹ and the many states that have eliminated fault-based divorce grounds altogether.⁶²

The Court’s Fourteenth Amendment analysis in the landmark abortion case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶³ lends further support to my argument. In *Casey*, the Court affirmed the essential holding of *Roe* and explained the essence of the due process doctrine in a new light when it discussed the rights that have been granted protection including, inter alia, the right to make personal decisions regarding marriage and the right to decide “whether to bear or beget a child.”⁶⁴ The Court explained:

⁵⁶ *Lawrence*, 539 U.S. at 578.

⁵⁷ *Id.* at 569–70 (discussing the problems of the historical arguments made with respect to sodomy).

⁵⁸ *Id.* at 571–72.

⁵⁹ *Id.* at 572 (emphasis added).

⁶⁰ See generally Thornton, *supra* note 51 (studying attitudinal changes with respect to divorce and possible causes thereof).

⁶¹ Traditionally all divorce statutes were “fault-based,” meaning that in order to obtain a divorce, one spouse was required to sue the other and prove grounds of fault. If no fault was found, a divorce would be denied. Around the early 1970s, states began to adopt no-fault alternatives through which a divorce could be obtained without having to prove the fault of one party. See generally Matthew Butler, *Grounds for Divorce: A Survey*, 11 J. CONTEMP. LEGAL ISSUES 164 (1999) (summarizing changes to, and the current status of, divorce laws as of 2000); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (providing an analysis of the shift from fault-based to no-fault divorce).

⁶² See Butler, *supra* note 61, at 165 (listing jurisdictions that have adopted no-fault divorce laws).

⁶³ 505 U.S. 833 (1992).

⁶⁴ *Id.* at 851.

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁶⁵

Again, this type of analysis would support a finding that a right to divorce should be included in the Fourteenth Amendment's concept of liberty. The decision to end a marriage is of a most personal nature⁶⁶ and is one that should be afforded due process protection as it bears directly on "one's own concept of existence."⁶⁷ The reference to autonomy in the above quotation is also quite relevant. If autonomy means anything, it must encompass an individual's right to decide that they no longer wish to remain married. Marriage is a relationship that the Court has described as "intimate to the degree of being sacred."⁶⁸ Surely, the personal decision of an individual to end a marriage when he has found that his marriage does not live up to such a standard must be protected.

Moreover, it is only logical that the decision to end a marriage is every bit as personal and intimate as the decision to enter one. To marry is to choose a person with whom to spend your life. It is the personal and intimate nature of this decision that makes it fundamental under the Fourteenth Amendment.⁶⁹ To divorce is to choose not to remain a life partner with that person. It is no less personal and no less intimate. While it is true that divorce involves changing a person's legal status in many respects, so does marriage, but the fundamental right to marry is not based on that status. It is based on the actual relationship between the spouses, as the right to divorce should be.

The question is not just whether society has traditionally accepted divorce, but whether it should be left to the state to decide who can and cannot end a marriage. The concept of liberty embodied in the Fourteenth Amendment, as addressed in cases like *Roe* and *Lawrence*, gives us an answer—"our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, con-

⁶⁵ *Id.*

⁶⁶ See The Honorable Robert W. Lueck, *The Collaborative Law (R)evolution: An Idea Whose Time Has Come in Nevada*, 12 NEV. LAWYER 18, 18 (2004), available at <http://www.nvbar.org/publications/Nevada%20Lawyer%20Magazine/2004/April/CollLaw.htm> ("A divorce is not a legal problem. It is a relationship problem with collateral legal consequences.").

⁶⁷ *Casey*, 505 U.S. at 851.

⁶⁸ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1964).

⁶⁹ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

traception, family relationships, child rearing, and education.”⁷⁰ A personal lifestyle choice such as whether to remain in a marriage should be up to the individual, not the government.

There is also direct doctrinal support for the finding that divorce should be entitled to full protection under the Fourteenth Amendment’s Due Process Clause. Divorce actions have been granted greater protection compared to other types of actions because of the special status of marriage in our society. In *Boddie v. Connecticut*, the Supreme Court found that denying access to a court of law in order to obtain a divorce, solely because of the inability to pay court fees, violated the Due Process Clause of the Fourteenth Amendment.⁷¹ Making similar arguments, the petitioners in *United States v. Kras* argued that the requirement of filing fees for bankruptcy actions were similarly unconstitutional.⁷² The Court, however, denied the *Kras* petitioners’ claim and distinguished *Boddie* on two grounds. First, the Court explained that in *Boddie* much attention was paid to the fact that there is no way to dissolve a marriage except through the judiciary. The Court, however, also noted that the “judicial forum in *Boddie* touched directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship.”⁷³ The Court continued to explain that, “[o]n many occasions we have recognized the fundamental importance of these interests under our Constitution.”⁷⁴ The distinction drawn between access to the courts for bankruptcy proceedings and divorce actions demonstrates the Court’s willingness to treat divorce with more protection than other rights. Furthermore, the express language of *Kras* brings divorce into the arena of fundamental rights surrounding marriage and marital decisions.⁷⁵ This was again reinforced in *M.L.B. v. S.L.J.*,⁷⁶ where the Court explained that “[c]rucial to our decision in *Boddie* was the fundamental interest at stake.”⁷⁷

The Supreme Court has not yet directly ruled on whether there does exist a fundamental right to divorce under our Constitution. However, the doctrine surrounding marital relationships and the special treatment of divorce in the Fourteenth Amendment Due

⁷⁰ *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

⁷¹ *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (“[D]ue process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.”).

⁷² *United States v. Kras*, 409 U.S. 434, 435 (1973).

⁷³ *Id.* at 444.

⁷⁴ *Id.*

⁷⁵ See *Zablocki v. Redhail*, 434 U.S. 374, 385 n.10 (1978) (citing the differences between *Boddie* and *Kras* as supporting the fundamental importance of marriage).

⁷⁶ 519 U.S. 102 (1996) (holding that a fee requirement violated the Due Process Clause when proceedings resulted in termination of parental rights).

⁷⁷ *Id.* at 113.

Process Clause cases suggest that the Court should find that such a fundamental right does exist.

III. HEAVY BURDENS AND WAITING PERIODS INFRINGE ON THE FUNDAMENTAL RIGHT TO DIVORCE

It is my contention that many divorce laws now in effect that require heavy burdens and extended waiting periods infringe on the fundamental right to divorce. My challenge is aimed at both fault-based⁷⁸ and no-fault⁷⁹ divorce proceedings.

A. Divorce Laws

It is true that some form of no-fault divorce is offered in all jurisdictions.⁸⁰ However, in many states, fault-based divorce statutes still exist and are put to use.⁸¹ Furthermore, no-fault grounds, while appearing to be a feasible alternative, are not always as simple as one might think.⁸² I will be using Illinois law as a prototype of divorce legislation, which includes both fault-based and no-fault grounds, that should be found unconstitutional under the Due Process Clause of the Fourteenth Amendment.⁸³

In Illinois, there are twelve different grounds for divorce. The fault-based grounds include impotence, a finding that one party is still married to a previous spouse, adultery, desertion, habitual drunkenness, addiction to drugs, attempted murder, extreme and repeated physical or mental cruelty, conviction of a felony, and one

⁷⁸ See generally Butler, *supra* note 61 (discussing various states' divorce laws).

⁷⁹ *Id.*; see *infra* note 82 (discussing different types of no-fault statutes).

⁸⁰ See Butler, *supra* note 61, at 164 (noting all jurisdictions have some form of no-fault divorce law).

⁸¹ See *id.* Some examples of states that still provide fault grounds include Alabama, Connecticut, Mississippi, New York, and Utah. *Id.* at 170. For an overview of traditional fault grounds and what they entail, see HOMER H. CLARK, JR. & ANN LAQUER ESTIN, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 656–59 (7th ed. 2005).

⁸² There are different types of no-fault statutes. Some states are considered pure no-fault, meaning they have abolished all fault grounds and only offer no-fault divorces. Pure no-fault states, including California and Colorado, make up a small minority. Thirty-three states offer some form of a marriage breakdown ground, such as "irremediable breakdown," or "irreconcilable differences." The remaining states permit no-fault divorce based on the grounds of living separate and apart, with periods of required separation ranging from six months to three years. For an overview of the types of no-fault statutes and lists of states employing each, see CLARK & ESTIN, *supra* note 81, at 646.

⁸³ I chose Illinois because it is an example of a state offering no-fault as well as fault-based grounds and because the no-fault section requires a waiting period. Because I challenge both fault-based legislation and no-fault statutes that include waiting periods, and because Illinois law is relatively typical compared to other jurisdictions with these types of laws, it was a good prototype of the kind of legislation I argue should be found unconstitutional.

spouse infecting the other with a sexually transmitted disease.⁸⁴ To be entitled to a divorce on any of these grounds, fault must be proven in a court of law.

To avoid having to prove fault in Illinois, the parties must have lived separate and apart for a continuous period in excess of two years and, in addition, they must show that irreconcilable differences have caused the irretrievable breakdown of the marriage. Then, the court must determine that efforts at reconciliation have failed or that future attempts to reconcile are not practicable or not in the family's best interest.⁸⁵ The two year separation period can be waived so long as the parties agree to do so and have lived separate and apart for six months.⁸⁶

B. Infringement

The Illinois laws (and other similar states' laws⁸⁷) infringe on the right to obtain a divorce in various ways. Going through a divorce is a very difficult personal and emotional experience, and difficult divorce laws make obtaining a divorce an onerous and burdensome *legal* process as well.⁸⁸

It is important to note here that unconstitutional infringement does not require an outright ban of the protected activity. In *Carey v. Population Services International*,⁸⁹ where the Court struck down a regulation prohibiting the sale of contraceptives to minors, the Court pointed out that the "same test must be applied to state regulations that burden an individual's right to decide to prevent conception . . . by *substantially limiting the access to the means of effectuating that decision* as is applied to state statutes that prohibit the decision entirely."⁹⁰ Therefore, the law in question need not provide for an absolute prohibition of a protected activity in order for it to be found to infringe on a protected right.

In *Casey*, the Court applied an undue burden standard, holding that "[o]nly where state regulation imposes an undue burden on a woman's ability to [have an abortion] . . . does the power of the State reach into the heart of the liberty protected by the Due Process

⁸⁴ 750 ILL. COMP. STAT. ANN. 5/401-a1 (West 1999).

⁸⁵ 750 ILL. COMP. STAT. ANN. 5/401-a2 (West 1999).

⁸⁶ *Id.*

⁸⁷ See Butler *supra* note 61 (examining various state divorce laws).

⁸⁸ See Lueck *supra* note 66, at 18 ("By nature, domestic relations cases are among the most difficult, because they involve considerable emotional stress and uncertainty for litigants and the attorneys."); Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 321 (2004) ("[W]hile statistically normal, the divorce passage is far from easy for most people.").

⁸⁹ 431 U.S. 678 (1976).

⁹⁰ *Carey*, 431 U.S. at 688 (emphasis added).

Clause."⁹¹ It is this type of standard that would be most relevant to the analysis of divorce laws. The argument for applying this type of standard is further supported by the finding in *Zablocki* that reasonable regulations of marriage are permissible, while more significant infringements are not.⁹² This statement implies that only a significant interference, as opposed to an outright ban, is necessary for the Court to find that a marriage-related law is unconstitutional. It is not necessarily the case that the laws I am challenging always make obtaining a divorce impossible (although that is sometimes the case), but it is true that they place significant burdens⁹³ on the exercise of the right, and the state interests do not suffice to justify these burdens—a proposition which I will discuss in Section IV in greater detail.

I will begin my analysis on infringement by discussing fault-based divorce laws. Applying the standards enunciated in *Carey* and *Casey*, it should be found that such laws infringe significantly on the right to obtain a divorce. In Illinois, an individual seeking a divorce on fault-based grounds must prove that one of the statutory grounds exist⁹⁴ and they sometimes require substantial evidence.⁹⁵ This process of proving fault involves drawn out litigation, and at times hurtful accusations, both of which are emotionally tolling for everyone involved.⁹⁶ "The traditional adversary system . . . intuitively encourages conflict and often inflames the feelings of anger, hostility, emotional pain, and emotional trauma that normally accompany the divorce process."⁹⁷ The necessity of proving that a spouse has committed adultery or has committed extreme and repeated physical or mental cruelty in order to end a marital relationship is a significant intrusion into the

⁹¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

⁹² *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("[R]easonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.").

⁹³ An example of a law placing an undue burden on obtaining an abortion is the requirement of spousal notification. The court found that such a requirement would impose a "substantial obstacle." *Casey*, 505 U.S. at 893–94.

⁹⁴ See *supra* note 84 and accompanying text (discussing fault-based grounds for divorce in Illinois); *Morrow v. Morrow*, 145 N.E.2d 381, 383 (Ill. App. Ct. 1957) (holding that a divorce can only be granted for causes listed in the statute and anything less is not sufficient as grounds for divorce).

⁹⁵ See *Metoyer v. Metoyer*, 235 N.E.2d 882 (Ill. App. Ct. 1968) (holding that to establish adultery, proof of the clearest and most convincing nature must be provided to prove that the actual carnal act was committed).

⁹⁶ See Paul A. Nakonezny et al., *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity*, 57 J. MARRIAGE & FAM. 477, 477–78 (1995) (describing the system of proving fault as perpetuating "acrimony and conflict in the social-psychological and communication climate of the divorce").

⁹⁷ Lueck, *supra* note 66, at 18.

marriage relationship itself,⁹⁸ as well as an impermissible "substantial obstacle"⁹⁹ to the exercise of the protected right to divorce.

At times the burden is incredibly demanding. In Illinois, it has been held that to establish cruelty within the meaning of the divorce law a spouse must prove by a preponderance of the evidence that the alleged guilty party committed acts of physical violence against the other spouse resulting in pain and bodily harm on at least two separate occasions.¹⁰⁰ Once is not enough. This is a heavy burden to bear, and a lot to have to stand, especially considering the evidentiary issues that can present themselves in such a situation.¹⁰¹ Furthermore, a divorce will only be granted on fault-based grounds to an *innocent person*,¹⁰² free from fault herself, whose spouse is proven guilty of the type of wrongdoing that constitutes fault under the applicable statute.¹⁰³

There is also a direct and significant parallel between the burdens that these laws impose and those that the Court considered in *Casey*, where a law requiring spousal notification in order to obtain an abortion was struck down. In finding that the notification law imposed a substantial obstacle, the Court paid much attention to the fact that the law could prevent women who are victims of domestic violence

⁹⁸ See Dana Milbank, *Blame Game: No-Fault Divorce Law is Assailed in Michigan, and Debate Heats Up*, WALL ST. J., Jan. 5, 1996, at A1. In her article, Dana Milbank quotes the Michigan Bar's Family Law Section, an organization made up of a group of divorce lawyers who have spoken out against recent proposals advocating a return to fault-based divorce regimes, because they believe such laws result in invasions of privacy. Michael Robbins leads the group's resistance and stated that if states do return to fault-based regimes, lawyers will "need a private investigator again" and will have to "start snooping in the bedrooms." *Id.* He continued, "We don't want every aspect of life being examined and the courtroom being turned into a forum to air dirty laundry." *Id.*

⁹⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

¹⁰⁰ See *Haring v. Haring*, 260 N.E.2d 396, 398-99 (Ill. App. Ct. 1970) (finding that the defendant physically abused the plaintiff by a preponderance of the evidence despite conflicting testimony).

¹⁰¹ See Judith T. Younger, *Marriage, Divorce, and the Family: A Cautionary Tale*, 21 HOFSTRA L. REV. 1367, 1367-69 (1993) (describing the difficult aspects involved in proving fault). These problems are especially relevant when the case involves domestic violence. See Martha Heller, *Should Breaking Up Be Harder to Do?: The Ramifications a Return to Fault-Based Divorce Would Have upon Domestic Violence*, 4 VA. J. SOC. POL'Y & L. 263, 271 (1996) ("Because of heightened standards of proof, the increased stakes involved in fault-based divorce, and the hostility that so often accompanies fault-based proceedings, a fault-based system would erect a series of hurdles that would make it more difficult for victims of domestic abuse to pursue the option of divorce.").

¹⁰² A traditional defense to a fault-based divorce action is recrimination that occurs when the plaintiff is shown to have committed an act that would constitute a marital offense. When both parties are found at fault, the divorce is denied outright. See CLARK & ESTIN, *supra* note 81, at 660. Other defenses include connivance (occurs when the plaintiff consents to the commission of the offense) and condonation (when marital cohabitation resumes, the court interprets the continuation as forgiveness on the plaintiff's part). See *id.*

¹⁰³ See *supra* note 61 (discussing fault-based divorce laws).

from obtaining an abortion.¹⁰⁴ This analysis is directly analogous to situations that might occur involving divorce. Fault-based laws or those with extended waiting periods could render it impossible for women who are victims of domestic violence to obtain a divorce.¹⁰⁵ Because of the heavy burdens involved and the drawn out legal process, a domestic violence victim might not be able to prove fault and might be too afraid to even start the process, knowing that it will entail a long and difficult legal battle. This could result in a person being essentially trapped in an abusive relationship. Furthermore, any attempt to leave his or her spouse without first obtaining a divorce might not be a feasible option because of the other legal issues involved, such as property division and child custody.¹⁰⁶ The undue burden standard as applied in *Casey*, therefore, applies in an almost identical manner to a case involving divorce when domestic violence is an issue.

When an individual wants to end an inherently personal relationship like a marriage, it is a decision of the utmost personal "autonomy,"¹⁰⁷ and the state's requirement of proof of one of its listed statutory grounds, and the oppressive burdens that often accompany them,¹⁰⁸ is a major intrusion on that autonomy. Because the decision to divorce should be included among the "intimate and personal choices . . . central to personal dignity and autonomy,"¹⁰⁹ it is protected under the Fourteenth Amendment¹¹⁰ from the unwarranted state intrusion that these fault-based laws inflict.

¹⁰⁴ *Casey*, 505 U.S. at 893.

¹⁰⁵ See Lueck, *supra* note 66 (discussing the consequences of divorce law in Nevada).

¹⁰⁶ If an abused spouse does not have the economic resources to support herself, she might feel economically trapped, while a divorce would allow her to receive property and/or spousal support. If there are children involved, leaving without a divorce and some kind of custody arrangement can be dangerous, first, because it will likely only anger the abusive spouse, and second, because it is possible that kidnapping laws would apply to the situation.

¹⁰⁷ *Casey*, 505 U.S. at 884.

¹⁰⁸ See, e.g., *In re Marriage of Semmler*, 413 N.E.2d 502 (Ill. App. Ct. 1980) (holding that in order to establish grounds of extreme and repeated mental cruelty, it is not enough that reconciliation is no longer possible and the marriage appears to be dead); *Horzely v. Horzely*, 365 N.E.2d 412 (Ill. App. Ct. 1977) (denying divorce because the wife's testimony that the husband's behavior caused her depression at various times throughout the marriage was insufficient to establish the ground of extreme and mental cruelty); *Collins v. Collins*, 361 N.E.2d 787 (Ill. App. Ct. 1977) (holding that for alleged conduct to constitute extreme and repeated mental cruelty, it must have been substantiated on at least two occasions); *Klakk v. Klakk*, 354 N.E.2d 64 (Ill. App. Ct. 1976) (holding that conduct merely causing embarrassment is not enough to find mental cruelty).

¹⁰⁹ *Casey*, 505 U.S. at 851.

¹¹⁰ I am going to assume for purposes of the remainder of the discussion that there is an established fundamental right to divorce. In the event that a fundamental right was not found, rational basis review would apply, but for purposes of my argument I will be analyzing the divorce laws only under strict scrutiny.

Now I will turn the analysis to the no-fault alternatives that Illinois offers and why they too infringe on the protected right to a divorce. The no-fault statute, as described above, requires a two year separation when the parties do not agree to the divorce. Deciding to end a marriage is a difficult decision in and of itself without it being dragged out over a two year period—not to mention the many issues that can remain unsettled during this time, including economic support,¹¹¹ child custody, and visitation.¹¹² Although the required separation time is shortened to six months when the parties agree to a divorce, this does not apply when one spouse objects, and it can also be used by a spouse for the purpose of dragging out a divorce, possibly to gain leverage in negotiations. This is relevant because there are many instances in which one spouse might be at the mercy of the other.¹¹³ Furthermore, the same concerns arise here as under fault-based laws when domestic violence is involved.¹¹⁴

Here it is important to point out that the fundamental right to divorce is not solely grounded in the protection of marital decisions between spouses, but also in the concept of individual autonomy as described in *Roe*¹¹⁵ and *Casey*.¹¹⁶ “Liberty protects the *person* from unwarranted government intrusions,”¹¹⁷ and “the Constitution places limits on a state’s right to interfere with a *person*’s most basic decisions about family and parenthood.”¹¹⁸ It is not just the marital relationship that the Fourteenth Amendment’s liberty component protects, but the individual’s right to make personal decisions relating to that rela-

¹¹¹ See 750 ILL. COMP. STAT. ANN. 5/504-a (West 1999) (providing for maintenance upon dissolution of marriage); 750 ILL. COMP. STAT. ANN. 5/505-a (West 1999) (providing for child support upon dissolution of a marriage).

¹¹² See 750 ILL. COMP. STAT. ANN. 5/603-a (West 1999) (providing for temporary custody orders that stay intact only until dissolution is granted at which time a more permanent order will be instated).

¹¹³ Here is a hypothetical situation that illustrates the complications involved in the option of no-fault divorce that Illinois law offers: If only one spouse is the income producer and she does not want a divorce, the other spouse has the option of waiting two years to fulfill the requirement for no-fault, or going forward with a divorce on fault-based grounds. See 750 ILL. COMP. STAT. ANN. 5/401-a(1) (West 1999) (stating grounds for the dissolution of marriage in Illinois); 750 ILL. COMP. STAT. ANN. 5/401-a(2)(B) (West 1999) (including a period of cohabitation under written agreement as part of the time period for a separation). Because in cases like these economic issues such as maintenance and child support depend on a divorce action, as well as familial issues such as custody and visitation, a spouse can be forced into relying on a fault-based action. Then, we must ask, what happens if the party cannot prove fault? This is an example of the many difficulties that a person seeking a divorce might face. Even if it were possible to prove fault grounds, it would entail further litigation with unreasonable burdens of proof, especially considering the fundamental interest at stake.

¹¹⁴ See *supra* notes 105–06 and accompanying text.

¹¹⁵ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

¹¹⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

¹¹⁷ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (emphasis added).

¹¹⁸ *Casey*, 505 U.S. at 849 (emphasis added).

tionship. This is representative of the changes that have taken place in our culture with respect to domestic relations,¹¹⁹ and the Fourteenth Amendment must respect the individuals it was created to protect. Therefore, even when only one spouse desires a divorce, his or her autonomy and personal privacy require the protection of the Due Process Clause. So even if a six month separation requirement was a reasonable regulation (which is questionable¹²⁰), a two year waiting period for a no-fault divorce where one spouse objects is a clear example of the state placing an undue burden on the protected right to decide to end a marriage. The only alternative to waiting two years is to proceed on fault-based grounds, which, as I discussed above, also infringe on the protected right to divorce. The bottom line is that it should be the individual's choice to remain in a marriage, not the state's.

It is also important to consider the other rights that are affected by not being able to obtain a divorce. The inability to end a marriage keeps a person from entering a new marriage.¹²¹ Forcing people to remain in marriages they consider to be over, therefore, prevents them from formalizing new relationships.¹²² Furthermore, adultery is still a crime in some states,¹²³ so being forced to remain in a marriage can effect individuals' rights in the bedroom as well.¹²⁴

I will not go into Illinois's law in great depth because my point is more general. A divorce law requiring a heavy burden of proof¹²⁵ or an extended waiting period¹²⁶ infringes on the fundamental right to a

¹¹⁹ See Thornton, *supra* note 51, at 869 (concluding that rise in approval of marital dissolution accompanied the rise of divorce in the 1960s and 1970s).

¹²⁰ When a situation involves domestic violence issues, even six months might be too long to wait.

¹²¹ 750 ILL. COMP. STAT. ANN. 5/212-a(1) (West 1999) (listing prohibited marriages, including "a marriage entered into prior to the dissolution of an earlier marriage of one of the parties").

¹²² See *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (discussing the monopoly the state has over the dissolution of marriage and how there is no other way but through the judicial process for people to "liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage"). This could also involve fundamental right to marry issues.

¹²³ See, e.g., N.Y. PENAL LAW § 255.17 (McKinney 2000) (defining adultery as occurring when a person engages in sexual intercourse with another person when he has a living spouse or the other person has a living spouse).

¹²⁴ See Benjamin J. Cooper, *Loose Not the Floodgates*, 10 CARDOZO WOMEN'S L.J. 311, 313-14 (2004) (discussing the effects of *Lawrence* on laws criminalizing adultery and fornication). While these laws are seldom enforced, they have yet to be repealed, and theoretically, if a person is forced to remain in a marriage they do not want to be in, the marriage and the laws restrict their sexual rights.

¹²⁵ Here I refer to fault-based laws as requiring burdens that are too heavy.

¹²⁶ Extended waiting periods include those similar to the two year mark found in the Illinois statute. While a six month period might not infringe too heavily upon the right to divorce,

divorce. To dissolve a marriage is an individual and personal choice. The divorce process "is recognized to cause emotional trauma second only to the death of a spouse, and . . . requires unusual emotional resources from clients at a time when they typically are experiencing high levels of stress and lowered coping ability."¹²⁷ For the courts to require extended separations or proof of fault by one of the spouses only makes the entire procedure more difficult and more emotionally taxing. It can sometimes render it impossible.¹²⁸ The state's placement of heavy burdens and extended waiting periods for obtaining a divorce is an intrusion upon the personal decision to end a marriage and therefore infringes on the individual's protected right. Because it is an individual liberty protected by the Fourteenth Amendment that is at stake, the state's infringement is significant and the Constitution must be applied to protect the individuals involved.

C. Standard of Scrutiny

When a fundamental right is established, it does not mean that any legislation regulating that right is prohibited. "The Court's decisions recognizing a right of privacy . . . acknowledge that some state regulation in areas protected by that right is appropriate."¹²⁹ The courts, however, apply a standard of heightened scrutiny in examining legislation that purportedly infringes on a protected right.¹³⁰ Under *Roe*, the Court explained that "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."¹³¹ In *M.L.B.*, the Court described the standard of scrutiny in terms of balancing when it stated that courts must "inspect the character and intensity of the individual interest at stake, on the one hand, and the state's justification for its exaction, on the other."¹³²

In the context of marriage, the Court in *Zablocki* stated that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family

waiting two entire years and then bearing the burden of proving irreconcilable differences is an undue burden.

¹²⁷ Pauline H. Tesler, *supra* note 88, at 321.

¹²⁸ Some examples of when this would occur include a case in which both spouses are found at fault or fault cannot be proven. See *supra* note 101 (discussing the complications in proving fault in divorce cases). Another example is when fear of domestic violence is an issue. *Id.*

¹²⁹ *Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

¹³⁰ *Id.*

¹³¹ *Id.* at 155 (citations omitted).

¹³² *M.L.B. v. S.L.J.*, 519 U.S. 102, 120-21 (1996).

relationships.”¹³³ It explained further “that ‘critical examination’ of the state interests advanced”¹³⁴ is necessary. However, when enunciating the standard of scrutiny to be applied, the Court does not use the exact language found in *Roe*. The *Zablocki* Court explained that when a law “significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”¹³⁵ It is unclear what, if any, difference the Court intended by using the word “important” instead of “compelling” and “closely” tailored, as opposed to “narrowly.” These differences, however, do seem to appear in cases dealing with fundamental rights involving family as well as marriage. In *Moore v. Cleveland*,¹³⁶ which involved the “freedom of personal choice in matters of . . . family life,” the Court explained the standard in terms similar to those found in *Zablocki*.¹³⁷ There the Court held that when the government interferes with a freedom protected under the Due Process Clause, courts “must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”¹³⁸ While it is questionable whether the standard found in marriage and family cases is as strict as that found in the abortion cases, it is clear that the standard is heightened, and far greater than the rational basis review required in cases where no fundamental right is established. At the very least, when a law involving marriage or family issues is involved, the state must show that its interests in providing that law are important, and the law in question must be closely tailored to furthering such interests.

Assuming a fundamental right to divorce was established, therefore, the state would retain the power to regulate divorce, provided it had sufficient interests supporting the legislation, and that the regulations were closely tailored to further those interests.

IV. POSSIBLE STATE INTERESTS AND WHY THEY FAIL

A. Protecting and Stabilizing the Traditional Institution of Marriage

One possible state interest furthered by placing heavy burdens and waiting periods on divorce proceedings is the protection and sta-

¹³³ *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

¹³⁴ *Id.* at 383.

¹³⁵ *Id.* at 388.

¹³⁶ *Moore v. Cleveland*, 431 U.S. 494, 501 (1977) (striking down, on due process grounds, a residential ordinance that prohibited extended families from residing in the same home).

¹³⁷ *Id.* at 499.

¹³⁸ *Id.*

bilization of the traditional institution of marriage.¹³⁹ Marriage has historically been viewed as a public relationship, and it is often argued that there is a great "social interest in the family and marriage as social institutions."¹⁴⁰

While it is true that marriage plays a significant role in our society,¹⁴¹ it is also true that in many respects the *traditional* notion of marriage has all but disappeared.¹⁴² It was once legal for a husband to rape his wife,¹⁴³ and historically a wife could not own property because title could only legally be held in the husband's name.¹⁴⁴ These traditional patriarchal practices have been abandoned and are examples of how the marriage relationship has evolved. Furthermore, upon dissolution of a marriage "[t]he trend is toward giving a similarly favorable treatment to the wife as a homemaker and mother, whether the courts refer to an implied contract, partnership, or special equities,"¹⁴⁵ whereas, the "traditional view of marriage often tends to devalue homemaker services."¹⁴⁶ A recent example of another social systematic change is the recognition of same-sex marriage in Massachusetts.¹⁴⁷ These legal evolutions regarding marriage and its consequences, in addition to the transformation of divorce laws to include no-fault grounds, demonstrate the societal changes that have taken place with respect to domestic relations.¹⁴⁸ The state's interest, therefore, in protecting traditional marriages is lessened by the fact that marriage itself has evolved, and logically then, so must the individual's rights surrounding the marital relationship.

It is undisputable that marriage has changed a great deal over the years. It is also true, however, that courts tend to favor the traditional marital institution, and it is likely that its preservation would be con-

¹³⁹ See Swisher, *supra* note 37, at 277-78 ("[T]he importance of marriage and the nuclear family relationship as an invaluable social and institutional structure remains undiminished.").

¹⁴⁰ Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 177 (1916).

¹⁴¹ See *Loving v. Virginia*, 388 U.S. 12, 12 (1967) (describing the importance of marriage in the United States).

¹⁴² See Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 531 (2001) (discussing the development of family privacy regarding traditional notions of family).

¹⁴³ See Jaye Sitton, Comment, *Old Wine in New Bottles: The "Marital" Rape Allowance*, 72 N.C. L. REV. 261, 261 (1993) (describing traditional rape laws with regard to the marital exception).

¹⁴⁴ See Stewart, *supra* note 50, at 510 (explaining how, upon marriage, the husband assumed all of his wife's legal rights).

¹⁴⁵ Swisher *supra* note 37, at 278 (internal citations omitted).

¹⁴⁶ *Id.*

¹⁴⁷ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d. 941, 948 (Mass. 2003) (holding that a ban against same-sex marriage violates the Massachusetts Constitution).

¹⁴⁸ These changes are often referred to as the privatization of family law. See generally Singer, *supra* note 61, at 1445-47 (explaining how the "no-fault divorce revolution" provides an example of the privatization process).

sidered a legitimate interest.¹⁴⁹ However, even in the case that the interest in preserving traditional marriage is legitimate, burdensome divorce laws still fail scrutiny under the Due Process Clause because they are not closely tailored to protecting that interest.

When individual interests and society's interests bump heads, it can have a truly dizzying effect and finding balance is exceedingly difficult.¹⁵⁰ In the case of divorce, however, creating hoops for parties to litigate through is no solution. There is no evidence that the burdensome legal processes of divorce currently in effect in many states actually encourage or lead to stable marriages.¹⁵¹ When a fundamental right is involved, it is not enough that the state have a legitimate interest in its legislation, it must also be closely tailored to effectuate that interest.¹⁵² In the case of difficult divorce laws, waiting periods and heavy burdens have not been shown to have any effect on the duration or quality of marriages in our country.¹⁵³ The fact is, when a divorce is desired, a couple either gets one eventually, or they are prevented from doing so because of extenuating circumstances, as described in Section II.B above. So, while making it harder to obtain a divorce does not influence couples to work it out, it certainly does prolong and further complicate the dissolution process.¹⁵⁴

Here it is important to repeat a point previously made: an outright ban on an activity is not necessary to find that the law governing it is unconstitutional.¹⁵⁵ So, while it is true that the relevant divorce laws will not in many cases make obtaining a divorce impossible, the onerous legal process they entail can alone be found to infringe on

¹⁴⁹ In her concurrence in *Lawrence*, Justice O'Connor referred to preserving the traditional institution of marriage as a legitimate state interest. The issue, however, was not before the Court, and in the current discussion I argue that even in the event that such an interest is legitimate (which is questionable), the laws are not narrowly tailored to furthering the interest and therefore fail the strict scrutiny standard. See *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) (asserting that, here, Texas could not assert any legitimate state interest, such as national security or preserving the institutional notion of marriage); see also *infra* notes 142–48 (discussing the evolving notion of "family").

¹⁵⁰ See Hafen, *supra* note 1, at 464–72 (discussing the struggles between the social and individual interest in marriage).

¹⁵¹ See Milbank, *supra* note 98, at A1 (addressing proposals for a return to fault-based laws and noting that "critics doubt abandoning a no-fault system would keep families together. Divorce, after all is a legal matter, while marriage breakdown is sociological and economic").

¹⁵² See *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (establishing heightened scrutiny).

¹⁵³ See Heller, *supra* note 101, at 271 (observing that "a fault-based system would erect a series of hurdles that would make it more difficult for victims of domestic abuse to pursue the option of divorce"); Milbank, *supra* note 98, at A1 (explaining the reasoning underpinning the doubt that abandoning a no-fault system would keep families together).

¹⁵⁴ See Heller, *supra* note 101, at 283 (describing how a return to fault-based divorce laws would make "divorce proceedings . . . more challenging due to heightened standards of proof, increased stakes, and intensified hostilities").

¹⁵⁵ See *supra* notes 89–90 and accompanying text.

the fundamental right to divorce, since it in no way furthers the state's interest in preserving the institution of marriage.

While it is true that divorce rates have increased as divorce laws have become less restrictive, there is evidence that the change in law was due to attitudinal changes regarding divorce, not the other way around.¹⁵⁶ It was people's attitudes towards marriage, divorce, and their own autonomy and liberty that led to the widespread adoption of no-fault divorce options,¹⁵⁷ and it is this autonomy and liberty that the Fourteenth Amendment is meant to protect. Furthermore, there is evidence that the sudden increase in divorce rates was a temporary occurrence as the introduction of no-fault "merely speeded divorces already in the pipeline, causing a short-term increase."¹⁵⁸

It is also important to remember that in some cases courts will deny a couple a divorce, and we must keep in mind the ramifications that an outright denial of a divorce can have on a marriage. Instead of promoting a more stable relationship, a denial can easily result in a sham marriage of no substance.¹⁵⁹ Marriages that remain when a divorce is denied are not traditional marriages based on love and trust, but instead are forced companionships and often a mockery to traditional marriage when the "spouses" end up living apart, leading separate lives while still "married." A denial of divorce could also lead to false allegations of fault, or even a fault-worthy action on the part of a spouse, such as adultery, for the sole purpose of obtaining a divorce.¹⁶⁰ These are just a few examples of how these laws do not promote, and can even undermine, the state interest in preserving traditional marriages.

¹⁵⁶ See Stewart, *supra* note 50, at 535 ("Social changes impact divorce laws; divorce laws do not effect social change.").

¹⁵⁷ See Bradford, *supra* note 46, at 611–12 (describing how attitudes concerning the individual and family began to change in the early 1960s); Thornton, *supra* note 51, at 869 (studying attitudinal changes with respect to divorce and suggesting that changing viewpoints influenced changes in the law).

¹⁵⁸ Milbank, *supra* note 98, at A1. ("[University of] Wisconsin's Prof. Bumpass contends that no-fault laws, when enacted, merely speeded up divorces already in the pipeline, causing a short-term increase; divorce rates have been increasing steadily for a century, he says.").

¹⁵⁹ See *id.* ("Opponents [to a return to fault-based laws] . . . warn of . . . more instances in which men remain legally married but abandon their families.").

¹⁶⁰ One of the reasons fault-based divorce grounds were expanded, and states eventually adopted no-fault divorce regimes, was the common occurrence of couples creating grounds for themselves. Essentially, the spouses would agree on grounds and commit perjury to convince the court that grounds did in fact exist. Judicial integrity became a serious issue in the realm of family law. See Bradford, *supra* note 46, at 613–14 (explaining the history and problems of no-fault reform); Swisher, *supra* note 37, at 270 ("[U]nder a fault-based divorce regime, a number of couples in unhappy marriages often would have to fabricate various fault grounds for divorce and resort to perjury, often with the assistance of their legal counsel.").

B. Preserving Families and Ensuring Children's Well-Being

Another possible state interest against divorce is the preservation of traditional families and safeguarding the children of those families. One theorist argues that "[t]oday's lopsided competition between the individual and social interests has made the law a party to the contemporary haze that clouds our vision of what a family is or should be."¹⁶¹ This statement begs the question, who gets to decide what a family *should* be? Should the definition of such personal relations be left to the state or the family members themselves?

Again we are faced with the reality that the concept of "family"¹⁶² is changing and "traditional families"¹⁶³ are no longer necessarily the norm.¹⁶⁴ Examples of the evolution of the family in our society include the many states that permit adoption by single individuals, as well as homosexuals and same-sex couples.¹⁶⁵

The Court has also explicitly recognized the evolution of the American family. In *Moore v. Cleveland*, where an ordinance allowing only certain types of families to reside together was struck down, the Court held that the Constitution prevented the state "from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."¹⁶⁶ Justice Brennan, in his concurrence, expanded on this idea, stating that, "[i]n today's America, the 'nuclear family' is the pattern so often found in much of white suburbia," and "[t]he Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living."¹⁶⁷ In *Troxel v. Granville*,¹⁶⁸ a case addressing issues of grandparent visitation, the Court stated that "[t]he demographic changes of the past century make it difficult to speak of an average American family," and, "[t]he composition of

¹⁶¹ Hafen, *supra* note 1, at 471.

¹⁶² See Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 93–99 (1990–91) (describing the uncertainty of the definition of family and proposing that a functional approach to a definition would be consistent with the social values that family and marriage serve).

¹⁶³ See *id.* at 91–92 (defining "family" in the 1990s).

¹⁶⁴ See *Only One U.S. Family in Four is 'Traditional,'* N.Y. TIMES, Jan. 30, 1991, at A19 (discussing how the structure of families have changed from the 1970s to the 1990s).

¹⁶⁵ See Stella Lellos, *Litigation Strategies: The Rights of Homosexuals to Adopt Children*, 16 TOURO L. REV. 161, 166–74 (1999) (discussing the state laws that have been interpreted to allow adoption by gay individuals). But see *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 823 (11th Cir. 2004) (concluding "that there are plausible rational reasons for the disparate treatment of homosexuals and heterosexual singles under Florida adoption law").

¹⁶⁶ *Moore v. Cleveland*, 431 U.S. 494, 506 (1977).

¹⁶⁷ *Id.* at 508 (Brennan, J., concurring).

¹⁶⁸ *Troxel v. Granville*, 530 U.S. 57 (2000) (striking down a broad visitation statute on due process grounds because it interfered with the fundamental right to parent).

families varies greatly from household to household.”¹⁶⁹ Declaring a strong state interest in maintaining traditional family values also implies that non-traditional family settings are somehow lesser, or inferior to traditional ones.¹⁷⁰ Again, however, even if there was concrete evidence that traditional-style families are advantageous to a thriving society, and the Court found their preservation to be a sufficiently important state interest, there is still a “closely tailored” problem. The question that must be asked is when and how it was decided that burdensome divorce laws help to preserve traditional families in the first place. While divorce has been shown to adversely effect children in certain situations,¹⁷¹ this information is at best inconclusive¹⁷² and such effects are often attributable to problems faced by families prior to the beginning of the divorce process.¹⁷³ Furthermore, part of the problem with divorce is the legal burdens it involves that cause the process to be even more difficult than it inherently is.¹⁷⁴ If anything, difficult divorce legislation only increases the harmful effects on families, as opposed to mitigating them.

For legislation to be considered closely tailored to the proposed state interest, it must actually further that interest. “[W]hen a state . . . burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a . . . complete absence of supporting evidence.”¹⁷⁵ Considering the lack of evidence with respect to divorce litigation, it is not likely that state interests in stringent divorce laws should pass muster under strict scrutiny if applied in a Fourteenth Amendment Due Process Clause analysis.

¹⁶⁹ *Id.* at 63.

¹⁷⁰ See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 468 (1990) (arguing that “theories underlying the legal definitions of parent and nonparent deny the existence of nontraditional families”); Storrow, *supra* note 142, at 583–613 (discussing the tendency of courts to favor traditional families when non-marital children are involved); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 511 (1998) (“It is worth noting that critics of the traditional nuclear family attack it as a norm that sets other sorts of families apart as inferior.”).

¹⁷¹ See Tesler, *supra* note 88, at 322 (addressing the many studies documenting the harm that can be caused to children involved in “high conflict divorces”).

¹⁷² See Donna Ruane Morrison & Andrew J. Cherlin, *The Divorce Process and Young Children's Well-Being: A Prospective Analysis*, 57 J. MARRIAGE & FAM. 800, 800–03 (1995) (discussing the inconclusive and contradictory nature of studies evaluating effects of divorce).

¹⁷³ *Id.* at 808–10. (describing studies in which there was found to be no significance in the altered parenting measures).

¹⁷⁴ See Tesler, *supra* note 88, at 322 (discussing detrimental effects of “high conflict divorces” in particular).

¹⁷⁵ *Carey v. Population Servs. Int'l*, 431 U.S. 678, 696 (1976).

CONCLUSION

The Supreme Court has yet to be presented with the question of whether a fundamental right to divorce should be recognized under the Fourteenth Amendment. The doctrine surrounding the Due Process Clause implies that a decision as inherently personal as the dissolution of one's marriage must receive the utmost protection from unwarranted state interference. For a regulation to permissibly infringe on an experience as inherently personal as dissolving one's marriage, it must be tailored to effectuate a sufficiently important state interest. Many divorce laws in effect today do no such thing.

Traditionally, marriage was viewed more as a social institution than a private one, but that is no longer the case. Individuals are now demanding more respect for their marital decisions. The Fourteenth Amendment is meant to protect these individuals from the state's overreaching when such private matters are concerned. The Fourteenth Amendment must ensure that the state respects the personal decisions of its citizens. It is not just about the respect they desire, but the respect they deserve and the respect the Constitution is supposed to guarantee.